

An Exercise Exploring the Rationales for Punishment

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Early in the Spring semester, the first-year students engage in an exercise exploring the rationales of punishment. Playing the role of legislators, they determine whether to impose punishment, and how much punishment to impose, in a series of hypothetical cases. These fact patterns, drawn from cases students will read later in the semester, help students articulate their own sense of what makes conduct culpable, especially in circumstances raising issues of justification and excuse. In addition to thinking about some of the complexities in assigning consequences, such as developing graduated sentences, they begin to get a sense of the role of *actus reus* and *mens rea* in criminalization. Quite apart from the substantive learning, this experiential learning experience provides the students an opportunity to develop collaborative skills and brings needed energy to a sometimes tense and passive first-day classroom environment.

I. EXERCISE DESIGN

Students are asked to assume the role of legislators as opposed to litigants. Although playing the role of prosecutors or defense attorneys is quite effective for students in upper-level Criminal Procedure or Evidence classes, first-year students seem more readily to set aside their ideological predispositions when they are removed from the role of advocates. This legislative role-playing is built on in later classes when students explore issues such as over-criminalization and over-incarceration. At that time, students are asked to get a sense of the perspectives of their local, state and federal legislative representatives on criminal justice issues. The hope is that by learning about their own communities, students will be more informed and engaged citizens.

Students conduct this exercise collaboratively. Since much of the learning that typically occurs in the classroom is atomized, there is value in getting students to talk and work with one another, sharing ideas, resolving differences and reaching common ground. Besides skill building, the collaborative work brings other benefits. While most students come to the course excited about the subject matter, there is a certain anxiety in the first few classes of the semester, which leads some students to be passive. Having students break into small groups and talk amongst themselves breaks the tension in the room. As the ambient noise level rises with each group's chatter, the energy in the room dramatically rises and students begin to relax and engage.

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While larger groups are quite effective for exercises conducted mid-semester or in upper-level courses, for this exercise students work in pairs. Sometimes increasing the size can lead to some voices dominating the conversation, allowing others to revert to passivity. When students do this exercise in pairs, each has to talk and once students have spoken in this safe environment, they seem to be more invested in class dialogue and more comfortable speaking up in larger conversations.

Finally, the exercise draws on facts from cases the students will read throughout the semester. In past years, it has appeared that, when doing assignments, some students struggle with a critical reading of judicial opinions, focusing merely on capturing what the court had said. By the time the opinions are deconstructed in class, those students seemed to struggle with formulating their own sense of the issues. By fronting the facts of cases in this exercise, students develop their judgment without being influenced by what a judge may have said; then when they read the case later in the semester, they seem better positioned to critically analyze the opinion.

II. SUBSTANCE OF THE EXERCISE

Before the exercise begins, there is some general discussion about criminalization. Building off a story of a parent faced with a cookie-stealing child, students talk in general about the imposition of consequences, inevitably raising utilitarian and retributive ideas. Students also speak about what makes certain consequences “punishment,” honing in on the blameworthiness of the conduct and the social nature of the resulting harm.

The students then break up into pairs and hypothetical questions are posed asking them whether they would impose punishment and how much punishment they would impose. These fact patterns are drawn from homicide cases that students will encounter in the upcoming weeks as well as the ones that they will read later in the semester while studying justification and excuse defenses.

One set of fact patterns is meant to tease out their notions of the kinds of conduct that warrant the imposition of punishment, particularly the role of *actus reus* and *mens rea* in ascribing culpability. After drawing upon cases that raise issues of omission, causation, and social harm, they deal with cases where defendants acted with varying *mens rea*. Then to further tease out notions of moral blameworthiness, students turn to *hypos* drawn from cases raising issues of justification and excuse. In setting out these cases, first one variable is changed—the nature of the conduct. Then, the students deal with the change of another variable—the characteristics of the defendant. Then, once the homicide cases have been exhausted, students are asked how much punishment they would impose for other *malum in se* offenses, including rape, sexual abuse of a child, arson and kidnapping. Students are then asked to add to this chart their proposed punishments for some *malum prohibitum* offenses, such as failure to pay taxes and

failure to register guns. Finally, students deal with cases where a defendant engages in multiple criminal acts in the same course of conduct.

Students then reconvene and engage in a class discussion. While many interesting issues inevitably arise in this discussion, it is striking how regularly students assign a dominant, and even determinative, role to a defendant's motives, a view that becomes particularly salient when students study mens rea issues in the coming classes. Other interesting issues that often arise include the utility of retributive rationales in determining whether to impose punishment, and the role of utilitarian rationales in regulating the amount of punishment. Students also speak about issues such as: what it might actually mean to spend time incarcerated; recidivism; mandatory minimum sentences and three-strikes laws; the costs of incarceration; and the allocation of limited resources between crime prevention and the punishment of criminal behavior. The discussion also often touches on ideas about the need for graduated punishments and the efficacy of tailoring the amount of punishment through variations in criminalization versus sentencing.

